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IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL ADVANCED MEDIA and THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the Eighth Circuit, applying settled Supreme Court precedent, properly conclude that under the facts of this case, Missouri's state law of publicity could not create property rights in historical newsworthy facts without violating the First Amendment?

(2) Did the Eighth Circuit, in interpreting an expired contract under New York State law, properly interpret the 2002 licensing agreement between the Players Association and CBC and conclude that the Players Association breached a material obligation of the licensing agreement rendering certain provisions unenforceable against CBC?

CORPORATE DISCLOSURE STATEMENT

Respondent C.B.C. Distribution and Marketing, Inc. ("CBC") is a Missouri corporation. It has no parent company and no publicly-held company owns 10% or more of CBC.

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INTRODUCTION

Major League Baseball Advanced Media ("Advanced Media") and the Major League Baseball Players Association (the "Players Association") (collectively for purposes of this opposition brief, "Baseball"), would have this Court believe that the Eighth Circuit's decision below will have devastating world consequences and, without this Court's intervention, rights of publicity will be forever changed and commercial licensing agreements will be unenforceable. Nothing so dramatic is at stake. This case involves a nontraditional rights of publicity claim asserted by the Players Association, which the Eighth Circuit properly ruled is preempted by the First Amendment, and state-law contract interpretation.

C.B.C. Distribution & Marketing, Inc. ("CBC") commenced this action, seeking declaratory relief that it did not need a license from Baseball to use player statistics in the operation of its fantasy baseball games. On the insistence of the Players Association and its marketing partners, CBC had previously entered into a license agreement with the Players Association that, among other things, purported to include these rights. After the Players Association licensed these purported rights to Advanced Media, and Advanced Media refused to license CBC, CBC took the only action it could; it sought a declaration of its rights in court.

In affirming the District Court's decision that CBC, in fact, did not need a license to operate its fantasy games, the Eighth Circuit applied well-settled Supreme Court law, balancing the rights of publicity at issue

against the First Amendment as directed by this Court in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). The Eighth Circuit additionally held that as a matter of New York State contract law, the expired license agreement between the Players Association and CBC did not preclude CBC from using, and challenging Baseball on the right to use player statistics.

Congruent with Supreme Court precedent, the Eighth Circuit properly balanced CBC's First Amendment interests against Baseball's alleged publicity rights. Baseball now as a last ditch effort, seeks review by this Court because the lower courts' decisions were unfavorable to Baseball. This is not a proper basis for granting Baseball's Petition for Writ of *Certiorari.*

As to the contract issue, Baseball strays far from the Eighth Circuit's actual holding in an unconstrained effort to make this case appear worthy of this Court's attention. The Eighth Circuit concluded that based on New York State contract law, the contract terms at issue were unenforceable against CBC as a result of the Players Association's breach of a specific warranty provision in that contract. Baseball's only complaint is with the *application* of correctly stated law. Without a split of authority, legal error, or any erroneous factual finding, this is not a *certiorari*-worthy issue. *See* Supr. Ct. R. 10. For all of these reasons, and as set forth more fully below, *certiorari* should be denied.

STATEMENT OF THE CASE

The Licensing Agreement Between CBC and the Players Association

In 1991, three colleagues formed CBC, a small Missouri company offering fantasy sports games. CTA App. 489-90, ¶¶4, 6, 9; CTA App. 322, ¶¶6-7; CTA App. 1072-73, ¶¶4, 8-9. In 1993, after operating for approximately two years without a license or even a letter from baseball, CBC started operating its fantasy baseball games exclusively through *The Sporting News*, a popular periodical for baseball aficionados. CTA App. 493-94, ¶25. To the best of CBC's knowledge, in 1994 or 1995, the Players Association engaged in licensing discussions with *The Sporting News*. *Id.* CBC never believed that a license was necessary from any Major League Baseball entity or from the Players Association because CBC used only publicly available statistics and because no one involved with Major League Baseball, any of its affiliates, or any Major League Baseball player, had any role in the origination of fantasy baseball. CTA App. 493, ¶24. CBC, however, felt pressured to take a license to ensure the continuation of its business with *The Sporting News*. CTA App. 493-94, ¶¶25-26. Thus, in 1995, CBC ultimately agreed to pay 9% of the wholesale price of its game entries in exchange for a license. *Id.*; CTA App. 877-916.

After the first licensing agreement lapsed, CBC ultimately renewed its license in 2002, the agreement at issue, to again avoid the potential loss of a powerful business arrangement, this time with *USA Today*. Like

the first, CBC entered into this licensing agreement because the Players Association asserted and warranted in the agreements, that it owned the rights at issue and claimed CBC needed a license. CTA App. 917-933. As indicated by the provisions directed to the quality of the endorsement material and approval process of promotional materials, the licensing agreement was a form agreement used by the Players Association in its licensing of player merchandise and contained a variety of provisions favorable to the Players Association, including the in perpetuity no-contest clause at issue in this case. *Id.* at 925. The agreement was not an arms-length negotiation between entities with equal bargaining power.

Baseball Repeatedly Refused to Acknowledge Any Player Rights in Statistics

Major League Baseball Advanced Media was formed in 2000 by the various owners of the Major League Baseball teams and was, among other things, in charge of running MLB.com, Major League Baseball's Internet site. CTA App. 760 at 8:5-13; *see also* CTA App. 936-937. Between 2001 and January 2004, Advanced Media offered fantasy baseball games on MLB.com, but it did so without ever obtaining a license or permission from the Players Association, because Advanced Media expressly did not acknowledge the players' rights in statistics. CTA App. 747 at 38:17-20; CTA App. 753-54 at 47:7-20; CTA App. 1061 (Advanced Media telling the Players Association that "[n]umbers may be a grey area that we should discuss" and "we feel

like stats in this context are not subject to a MLBPA license").[1]

In January 2005, however, Advanced Media agreed to purchase from the Players Association certain interactive rights, which allegedly included fantasy baseball games. CTA App. 955-74. It was then that Major League Baseball and Advanced Media changed its position regarding the players' rights in the use of players' statistics in fantasy sports. *Compare* CTA App. 938 with CTA App. 749-51 at 40:25-43:11.

Advanced Media Refused to Grant CBC a License to Run its Fantasy Games

On the same day that the agreement between Advanced Media and the Players Association was announced, January 19, 2005, Advanced Media wrote to CBC, stating that CBC must immediately cease offering its fantasy baseball games, pending consideration of proposals for the upcoming season. CTA App. 496-97, ¶34. In response to the letter, CBC

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1. Advanced Media's former position that statistics are not owned by any party was further articulated by Major League Baseball in a case decided in the California courts. *See Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001). In that case, Major League Baseball, without permission, used the names, photographs and performance records of former Major League Baseball players on their website and in products such as program brochures and videotapes, several of which were sold for profit. *Id.* at 406. When the former players sued MLB and others for violating their rights of publicity, MLB argued that the use of players' statistics was protected by the First Amendment and the California court agreed. *Id.*

prepared and submitted a proposal outlining the games that CBC intended to offer, all of which were games consistent with those offered in the past. CTA App. 497, ¶35. Despite these efforts, Advanced Media refused to grant CBC any license to run its own fantasy baseball games. CTA App. 497, ¶36.

Instead, on February 4, 2005, Advanced Media proposed a one year license for CBC to use MLB league marks on CBC's website ***to market MLB's games*** to CBC's customers in exchange for 10% of related revenue. CTA App. 497, ¶37; CTA App. 975-77. In other words, Advanced Media wanted CBC to cease offering its own fantasy baseball games, and instead market MLB's games.[2] CTA App. 497, ¶37. The essence of this was for CBC to receive a one-time 10% commission in exchange for turning over all of its customers to Advanced Media and thereafter be out of the business. *Id.*

The Litigation

Without the possibility of license and threats from a large entity like Baseball, CBC was forced to file a Complaint for declaratory judgment against Advanced Media that it, among other things, was free to use player statistics in its fantasy games. Subsequently, the Players Association intervened in the litigation and all three parties moved for summary judgment.

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2. This was in furtherance of Advanced Media's plan to have only a handful of large businesses providing fantasy baseball through licenses with Advanced Media. *See* CTA App. 978-1060; CTA App. 757-58 at 136:9-19; Appellee CTA App. 1163-1213.

The Decisions Below

In August 2006, the District Court granted summary judgment to CBC. It held that the Players Association did not have a Missouri common law right of publicity in publicly available statistics, and that even if CBC were infringing the players' rights of publicity, CBC's First Amendment interests outweighed the players' rights of publicity in publicly available statistics. Dist. Ct. Memo. at 21-22. On summary judgment, CBC had argued in the alternative that Baseball's asserted rights of publicity were preempted by federal copyright law. *Id.* at 35. The District Court, however, rejected this argument finding no preemption. *Id.* at 35. Finally, the District Court, relying on *Lear Inc. v. Adkins*, 395 U.S. 653 (1969), held that no-use and no-contest provisions in the expired 2002 licensing agreement were unenforceable and void as a matter of public policy. Dist. Ct. Memo. at 46.

On appeal, the Eighth Circuit affirmed.[3] More specifically, the Eighth Circuit held that while CBC's use of statistics satisfied the elements of Missouri's common law right of publicity, applying this Court's decision in *Zacchini*, 433 U.S. at 562, CBC's First

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3. Though Baseball repeatedly refers to a "divided Eighth Circuit" the one dissenting justice on the Eighth Circuit panel agreed with the majority's opinion as to the rights of publicity and the First Amendment, and dissented only as to the contract holding. *Id.* at 14a-16a. According to the dissenting justice, § 8(a) of the licensing agreement did not constitute a warranty of ownership of exclusive rights to use names and statistics in fantasy games and did not render the other provisions unenforceable against CBC. *Id.* at 14a-15a.

Amendment interests outweighed the common law rights of publicity under the facts of this case. Pet. S.C. App. A at 7a-10a. Having so found, the Eighth Circuit declined to address CBC's alternative copyright preemption argument. *Id.* at 10a. As to the contract issue, the Eighth Circuit expressly did not reach the issue of whether *Lear* rendered the no-use and no-contest provisions of the licensing agreement unenforceable as found by the District Court. *Id.* at 11a-12a. Instead, the majority of the court determined that under New York law and, based on a warranty provision in § 8(a) of the licensing agreement, the Players Association could not enforce the contract's no-use and no-contest provisions against CBC. *Id.* at 11a-13a.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT PROPERLY STATED THE RULE OF LAW OF *ZACCHINI* AND BALANCED THE PUBLICITY RIGHTS AGAINST THE FIRST AMENDMENT RIGHTS AT STAKE.

In *Zacchini*, 433 U.S. at 562, this Court held that common law "rights of publicity" must always be balanced against the First Amendment interests otherwise restricted by the state law. Citing *Zacchini*, the Eighth Circuit in this action did just that; it balanced the players' rights of publicity under Missouri law against the First Amendment interests involved in using publicly available statistics to offer fantasy baseball. In its petition, Baseball does not contend that *Zacchini* is not the applicable law (it clearly is), or that the Eighth Circuit did not apply *Zacchini* (it clearly did).

Rather, Baseball is upset with the *outcome* of that balancing in the case at hand.

Recognizing that this is not a *certiorari*-worthy issue, Baseball contends for the first time in this litigation, that there is confusion in the law and that different *Zacchini* balancing tests, which Baseball now asserts are outcome determinative, abound. As shown in more detail below, however, there is no clearly defined split of authority, and here, in any event the Eighth Circuit articulated the correct law and properly applied it, and for these reasons *certiorari* should be denied.

A. The Supreme Court In *Zacchini* Established The Legal Test For Weighing State-Law Publicity Rights Against First Amendment Interests.

In *Zacchini*, 433 U.S. at 574, all nine Justices perceived the serious First Amendment issues raised by broad readings of rights of publicity. In that case, a human cannonball performer's *entire* act for which admission would normally be charged was broadcast by a local television station in its entirety. *Id.* A majority of five Justices held that where the First Amendment is raised as a defense to a state-law right of publicity claim, the two rights must be weighed against each other to ensure that both rights receive their due. *Id.* Specifically, this Court analyzed the type of right asserted and the amount of appropriation, *i.e.*, whether the news station was reporting newsworthy facts about Zacchini's act, which the First Amendment would trump, or the entire act. Additionally, this Court analyzed the economic and non-economic justifications for weighing in favor of the

state law right of publicity and against the First Amendment interests. In other words, the Supreme Court provided a clear indication of what to consider in conducting the balancing test. Players CTA Br., 35-36 (emphasis added) ("[t]he Supreme Court's analysis *makes clear* that even if CBC's products are somehow classified as 'speech,' CBC's right to 'speak' must be balanced against the state's interest in enforcing publicity rights").

B. The Eighth Circuit Correctly Applied *Zacchini* and Found That Any Rights of Publicity in Publicly Available Statistics Are Outweighed by CBC's Substantial First Amendment Interests At Stake.

The Eighth Circuit in this case, like other federal courts, properly recognized that *Zacchini* requires consideration of the First Amendment interests at stake in a right of publicity action and that it requires rejection of the state law cause of action when the First Amendment interests outweigh the right of publicity at issue. Pet. S.C. App. A at 7a. For this reason, applying the law of *Zacchini*, the Eighth Circuit considered the type of publicity right asserted and the amount of appropriation in the case, (*i.e.*, factual statistics printed in the newspaper everyday). Moreover, the Eighth Circuit analyzed the economic interests, (*i.e.* the fact that baseball players are not affected, at least negatively affected, financially by fantasy baseball) and the absence of non-economic interests weighing in favor of the publicity right (*i.e.* enforcing the right of publicity would not protect natural rights, reward celebrity labors, or avoid emotional harm as the players did not invent

fantasy sports and are not harmed by the publication of on-field performance statistics). Thus, the Eighth Circuit properly determined, consistent with *Zacchini*, that under these circumstances, the First Amendment right of freedom of expression outweighed the interests of the players in controlling the dissemination of their historic, factual playing records in connection with fantasy sports.

C. The Eighth Circuit's Decision Is Not Inconsistent With this Court's Decision in *San Francisco Arts & Athletics*.

Baseball asserts that *certiorari* should be granted because the decision of the Eighth Circuit conflicts with this Court's ruling in *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522 (1987), a case cited only in passing in the courts below and a case not involving the right of publicity. Despite its somewhat remote applicability and contrary to Baseball's assertions, the law employed by the Eighth Circuit, and the justifications for its holding, are squarely in line with this Court's analysis in *San Francisco Arts & Athletics*.

In *San Francisco Arts & Athletics* this Court only *reaffirmed* its holding in *Zacchini* that, when faced with a law restricting expression, courts must balance the interest behind the restriction against the magnitude of the speech restriction. Thus, in *San Francisco Arts & Athletics*, this Court examined Congress' interest in limiting, by federal statute, use of the word "Olympic" against the speech interest of the defendant to use the word in connection with a nine day athletic competition dubbed the "Gay Olympics."

Though this Court decided in that instance that the governmental interest outweighed the free speech interest, the Eighth Circuit's decision here is consistent with the analysis employed in *San Francisco Arts & Athletics*. In *San Francisco Arts & Athletics*, the economic incentives to supply the Olympic Committee with the means to raise money through advertising, and the non-economic incentives, to maintain a competition that first began in 776 B.C., and which helps build a better understanding of different cultures and a more peaceful world through international goodwill, outweighed defendant's First Amendment interests in using the exact same image carefully cultivated by the U.S. Olympic Committee. On the other hand, in this case, the Eighth Circuit properly concluded that the players' right to control publicly available statistics and historical facts about the "national pastime" had to give way to the substantial First Amendment right in the free flow of information embodied in fantasy baseball. Notably, while CBC (and other small fantasy sports companies) could not operate without use of the publicly available statistics, *San Francisco Arts & Athletics* could hold its sporting event, just not using the word "Olympic" to promote it.

Thus, despite the differences between *San Francisco Arts & Athletics* and the Eighth Circuit's holding in this case, in both instances the interests at stake were properly balanced and applied to the facts of the case. As a result, there is nothing inconsistent about the Eighth Circuit's decision justifying a grant of *certiorari* in this case.

D. The Eighth Circuit's Decision Is Not Inconsistent With the "Game Cases."

Despite articulation of the correct law and proper application, Baseball argues that the employ of the test articulated by this Court in *Zacchini* conflicts with all of the previous "game" cases. The three board game cases (*Uhlaender*, *Rosemont* and *Palmer*) relied on by Baseball, however, are easily distinguishable. First, all of the decisions, the most recent of which is 34 years old, **came before *Zacchini*** and the substantial body of modern case law expanding the protections of the First Amendment to fully embrace information dissemination. *See Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Palmer v. Schonborn Enters., Inc.*, 232 A.2d 458 (N.J. Super. 1967); *Rosemont Enters., Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144 (N.Y. Sup. 1973). Moreover, the Eighth Circuit's decision to employ the *Zacchini* balancing test cannot contravene *Uhlaender* and *Palmer*, when neither case even mentions the First Amendment much less the test to weigh rights of publicity against First Amendment interests. *See Uhlaender*, 316 F. Supp. at 1277; *Palmer*, 232 A.2d at 458. Thus, the Eighth Circuit properly addressed the implications of the First Amendment in the context of fantasy baseball and/or the dissemination of information, and balanced the right of publicity against First Amendment interests as this Court instructed in *Zacchini*.

II. BASEBALL'S ASSERTION OF "CONFLICT AND CONFUSION" IN THE LAW IS OVERSTATED, A CONCLUSION REINFORCED BY THE PLAYERS ASSOCIATION'S AND ADVANCED MEDIA'S CHOICE TO NOT MAKE IT AN ISSUE IN THE COURT BELOW.

Baseball for the first time contends in the petition that the interpretation of the balancing test outlined in *Zacchini* is unclear. In fact, in the Eighth Circuit, the Players Association argued that "[t]he Supreme Court's analysis *makes clear* that even if CBC's products are somehow classified as 'speech,' CBC's right to 'speak' must be balanced against the state's interest in enforcing publicity rights." Players CTA Br., 35-36 (emphasis added).

Furthermore, Baseball claims, again for the first time, that balancing tests proliferate, and Baseball even articulates six formulations of *Zacchini's* balancing test employed by state and federal courts. *Compare* Players CTA Br. at 37 (in which the Players Association informed the court of only four articulations, including the *Restatement (Third) of Unfair Competition* §§46-47 (1995), California's "transformative test", Missouri's "predominant purpose test", and the 10th Circuit factors). Yet, the Players Association argued in its lower court briefing that: "All of these *tests are consistent with Zacchini* and Missouri's test, and all protect the federal interest at stake." Players CTA Br. at 37. In a way to further clarify for the Eighth Circuit, the Players Association concluded that "*[f]ederal and state courts have used different formulations of Zacchini's balancing directive. These tests all protect First Amendment rights, because all focus on the extent to which enforcement of*

the right would impinge upon expression." Players CTA Reply Br. at 17 (citations omitted).

Baseball also now contends that the selection of the balancing test is outcome determinative. This is precisely contrary to their arguments below. Indeed, while the Players Association argued that each of the tests resulted in a favorable outcome to Baseball, it also told the lower court that it did not matter which test the court selected: "[r]egardless of which balancing test this Court uses for weighing the State's interest in enforcing publicity rights against CBC's asserted right to speak, publicity rights should prevail." Players CTA Reply Br. at 2 (citations omitted).[4]

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4. CBC agrees with Baseball's previous contention, *i.e.*, that the court's formulation of *Zacchini*'s balancing test is not outcome determinative. Regardless of what test is applied, the facts of this case when balanced weigh, as the Eighth Circuit and District Court found, in favor of CBC's First Amendment interests. For example, since player names are used in fantasy baseball predominantly to convey information, under the "predominant use" test adopted by the Missouri Supreme Court, CBC's First Amendment rights prevail. CBC's First Amendment rights would also prevail under California's "transformative test." There can be no dispute that the players' names are only one of the raw materials from which on-line fantasy sports games are created. *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (Cal. Ct. App. 2006); *see Winter v. DC Comics*, 69 P.3d 473, 479-80 (Ca. 2003). The Restatement test asks whether the use of the name or identity is related to the work as a whole. *See also Restatement* §§46-47. This too would obviously favor CBC's First Amendment rights, as baseball player names and statistics are plainly related to a game where the participants pretend to manage a Major League baseball team. *Cf. Rogers v. Grimaldi, MGM/UA Enter. Co.*, 875 F.2d 994 (2d Cir. 1989).

As an indication of this position, and the minor role the various formulations of the balancing test played in the court below, in the entire oral argument to the Eighth Circuit, Baseball spent just thirty seconds discussing the balancing tests, (predominant purpose, the transformative and Restatement test - not six different tests as Baseball argues now) and concluded that "in each instance what these tests are trying to determine is whether there is any core First Amendment interests such as expressive interests or creative interests at stake." *See* Oral Arg., 31:00 – 33:25.

A. After Claiming All Of the Tests Are Consistent with *Zacchini* And Yield the Same Result In the Courts Below, Baseball Should Be Judicially Estopped From Now Arguing Otherwise.

Judicial estoppel bars a litigant from taking inconsistent positions in litigation. *See New Hampshire v. Maine*, 532 U.S. 742, 749-751 (2001). Here, Baseball, with only self-serving motives to get this Court to hear its case, has done a complete 180 of its previous argument that the various formulations of applying *Zacchini* are all consistent with the same focus, and now argue that there are six different tests. Baseball now contends that these tests vary from the balancing test articulated in *Zacchini*, and that the choice of test results in different outcomes. Given Baseball's stance in the courts below, Baseball should be judicially estopped from asserting this position now.

B. A *Certiorari*-Worthy Split Does Not Exist.

Contrary to its position now, Baseball had it right in the courts below, *i.e.*, though some federal and state courts have used different formulations of *Zacchini*'s balancing directive, all attempt to balance right of publicity laws, which vary among the states, against the interests of the First Amendment. For this reason, a *certiorari*-worthy split of authority on an important issue of law does not exist.

The various formulations applied to balance the First Amendment interests and publicity rights have only developed through the application of *Zacchini* to particular facts, as the factual circumstances in rights of publicity cases vary greatly[5]. As the Players

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5. For example, the use of an Olympic weight lifter's name and likeness on a series of promotional disposable Dixie cups (*Vinci v. American Can Co.*, 591 N.E.2d 793, 794 (Ohio App. 1990)), Major League Baseball's use (like CBC's use in this case) of baseball statistics on its web site and in connection with other products that it sold for profit (*Gionfriddo*, 94 Cal. App. 4th at 400), images of the Three Stooges on a T-shirt (*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Ca. 2001)), caricatures of active baseball players on the front and humorous commentary about their careers on the back of trading cards (*Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996)), a painting which commemorates Tiger Woods' victory in the 1997 Masters Tournament (*ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003)), a Japanese video game with a character inspired by a real musician (*Kirby*, 144 Cal. App. 4th at 57-58), a comic book character based on the identity of the hockey player, Tony Twist (*Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003), *cert. denied*, 540 U.S. 1106 (2004)), a basketball star's

(Cont'd)

Association has argued before (and Advanced Media conceded by omitting any reference to different formulations of the balancing test), the various formulations used by a state or federal court are to assist the court in balancing the interests in divergent facts and circumstances, and under different "right of publicity" laws. Courts across the country have used those factors which are relevant to the specific facts of the case, and reached relatively consistent results. *Compare Gionfriddo*, 94 Cal. App. 4th at 410 with *Rogers*, 875 F.2d at 1004. No further clarification by this Court is needed and *certiorari* is not warranted.

Indeed, because the Supreme Court has made clear that the First Amendment interests are to be balanced against state law publicity rights, after *Zacchini*, this Court has denied *certiorari* in cases involving the balance between the First Amendment and state-law rights of publicity. *See Doe*, 110 S.W.3d at 363, *cert. denied*, 540 U.S. 1106; *see also White*, 971 F.2d at 1395, *cert. denied*, 508 U.S. 951. Here, too, *certiorari* should be denied.

Finally, since most publicity cases deal with endorsements and advertising, even if there were a split in authority, a point with which CBC disagrees, this case's fact pattern (the use of statistics in fantasy sports)

(Cont'd)

former name in a television car commercial (*Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996)), a singer's voice in a radio snack food commercial (*Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097-98 (9th Cir. 1992)), and a game show hostess' "identity" in print advertisements for electronic products (*White*, 971 F.2d at 1396).

makes it an outlier and a poor vehicle for review of the *Zacchini* balancing test. For all of the aforementioned reasons, *certiorari* should be denied.

III. THE EIGHTH CIRCUIT PROPERLY ARTICULATED AND APPLIED NEW YORK LAW IN RULING THAT THE RESTRICTIVE COVENANTS OF THE 2002 LICENSING AGREEMENT WERE UNENFORCEABLE.

Despite Baseball's assertion to this Court, the Eighth Circuit did *not* hold that "the First Amendment bars enforcement of CBC's no-use and no-challenge obligations." Pet. S.C. Br. at 30. Before the District Court and the Eighth Circuit were at least two reasons for addressing this case on the merits and declining the Players Association's request to not do so because of the restrictive covenants in the expired 2002 license agreement: (1) under this Court's decision in *Lear*, 395 U.S. at 653, the restrictive covenants (non-use and no-contest provisions) were unenforceable because, if enforced, they would allow Baseball to monopolize a massive industry in perpetuity that it played no part in developing; and (2) under basic principles of New York contract law (the law of choice in the agreement), the restrictive covenants were unenforceable. The Eighth Circuit expressly did not address *Lear*, and instead, resolved the issue by employing traditional contract principles of New York state law. Pet. S.C. App. A at 11a-12a ("[w]e do not reach the issue of whether *Lear* is applicable here, though, because we believe that the contested contract terms are unenforceable for a different reason."). Baseball asks this Court to engage in fact-intensive error-correction of a state-law contract

provision. This is, of course, not a credible basis for a grant of *certiorari*.

A. The Eighth Circuit Correctly Stated New York Warranty Law.

In New York, as the Eighth Circuit held, a contractual warranty is defined as "an assurance by one party to a contract of the existence of a fact upon which the other party may rely." Pet. S.C. App. A at 12a (citations omitted). Thus, the Eighth Circuit's review and analysis of the contract under New York law and application of New York's definition of "contractual warranty," which Baseball does not contend was improper, was not legal error.

B. The Eighth Circuit Correctly Applied New York Warranty Law to the Facts of the Case.

In applying New York's definition of "contractual warranty" to the 2002 licensing agreement, the Eighth Circuit properly interpreted §8(a) as a warranty of title provision. *See* Pet. S.C. App. A at 12a-13a. Indeed, in no place in its petition does Baseball argue that the Eighth Circuit's determination that §8(a) is a warranty of title clause is incorrect or in error. Rather, Baseball contends that the Eighth Circuit erred in the conclusion that it *breached* the warranty of title clause under the facts of this case.

At the outset, the Eighth Circuit properly concluded that in light of all the facts, Baseball's warranty that it owned exclusive "right, title and interest" in publicly available statistics in the context of fantasy baseball was

erroneous and a material breach of the contract. The Eighth Circuit's holding, however, is not a matter warranting this Court's review. The decision was based on a particular contract provision as applied to a particular set of facts. In an attempt to bolster the importance of a simple contract interpretation issue, Baseball argues that the Eighth Circuit's holding weakens other contracts or "threatens all contract commitments". Pet. S.C. App. A at 15. Yet, rather than deciding the case under *Lear*, (which arguably may have had broader implications), the Eighth Circuit's holding, based solely on New York state contract interpretation, was limited to the interpretation of the 2002 licensing agreement between the Players Association and CBC. There is no precedential value or broad rule of law that implicates the strength or validity of other licensing agreements. Moreover, the law applied by the Eighth Circuit is not in conflict with any other law, nor does Baseball even suggest a *certiorari*-worthy split of authority here. With no split in authority, legal error, or error in application of the law to the facts, the petition should be denied. *See* S.C. Rule 10.

CONCLUSION

For the foregoing reasons, Baseball's Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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